Comments on the Sentencing Amendment (Restorative Scheme) Bill

Introduction

Engender Equality is a Tasmanian specialist family violence service providing counselling, psychoeducation and support for all people affected by family and intimate partner violence, alongside advocacy, community education and training to address gender inequality and gendered violence in all its forms. We welcome the opportunity to comment on the *Sentencing Amendment (Restorative Scheme) Bill 2021* (the Bill).

Response to the Bill

Engender Equality welcomes the interrogation of inherited sentencing practices in Australia and the recognition that punitive responses to sexual violence and family violence offences often fail to deliver an experience of safety, accountability and justice for victim-survivors. Further, we acknowledge that criminal justice responses mostly fail to provide a rehabilitation opportunity to people who are deemed to have committed criminal acts. In addition to this failing, many victim-survivors accessing Engender Equality's services report that a period of incarceration reinforces unwanted behaviours and strengthens social networks and cultures that are driving abusive and violent behaviours in their former and current partners.

We unequivocally support critiques of the criminal justice system and applaud the leadership of the Australian Lawyers Alliance and other advocates of alternatives to Australia's draconian and ineffective criminal justice model. Accordingly, we support the consideration of evidence-based alternatives to the retributive justice paradigm within the criminal justice system in Tasmania, where it is safe to do so and where survivors seek such outcomes, including restorative justice schemes. Engender sees a role for restorative justice where:

- victim-survivors want the relationship to continue or where co-parents need to be able to raise children in a harmonious and supportive way;
- for younger people or when abusive behaviours have recently emerged and are less ingrained;
- the primary aggressor is remorseful and accepts accountability.

As things stand, however, Engender Equality considers the establishment of a restorative justice scheme within Tasmania's criminal justice system risky. This perception is based on the lived experience of our clients across all regions of Tasmania, who consistently describe an absence of family and sexual violence informed practice, including foundational understandings of trauma and the dynamics of power and control, within the delivery of criminal justice interventions and mechanisms. As a result of the cultural absence of these frameworks, clients report that their attempts to access safety and accountability for themselves and their children through mechanisms such as family dispute resolution or the courts are often as traumatising as the preceding violence or abuse.

Until there is recognition by the Department of Justice of the need for widespread training and culture change in relation to the delivery of sexual and family violence interventions and responses – including with regard to the potential delivery of collaborative and restorative justice initiatives – we cannot safely recommend the establishment of such initiatives in Tasmania.

We note the intent to establish a Restorative Scheme Intermediaries Panel to ensure practitioners within the scheme possess the necessary skills and expertise, however, again, our experience of the sector as it currently operates is that recruitment of skilled individuals into such pivotal roles in Tasmania is erratic.

Having noted these concerns, we have few suggested amendments to the Bill itself, which appears exceptionally thorough. We do wonder whether and how the Bill might provide recourse to victim-survivors should the restorative justice process not be experienced as safe and/or restorative? We also suggest that the Bill specify a timeframe for evaluation and public reporting against its stated objectives.

Further information

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Appendix: A victim-survivor response to the Sentencing Amendment (Restorative Scheme) Bill

Lack of trauma and family violence informed practice

I have very strong concerns about judges having discretion to apply protections for victims. The restorative scheme proposed in the Bill seems to give much power to judges to determine the seriousness of the offence, where a jury may have that role in a trial.

While abolishing juries and having judge only trials may be seen as favourable in sexual assault cases (reducing the impact of societal biases), I fear that judges who do not have a very high level of understanding of the issues before them will be given too much power and that this would ultimately harm victims greatly.

My experience in the Federal Circuit Court recently left me with little faith in justice being achieved for victims throughout court processes. I was left badly traumatised by my experience and have been unable to work in my business for 7 months due to the severity of my PTSD.

I firstly want to point out that I have been through the Federal Circuit Court on two separate occasions and with two different judges presiding. The first time was extremely stressful as would be expected in any family court situation, but the judge was respectful to both parties, and I came away feeling positive and as though I had been able to be heard and put my case across. This was not my experience in the second case I experienced this year.

The Federal Circuit Court would see the most acrimonious cases of family law where children are involved, including cases where sexual offences may have been committed within these relationships. My expectation was, therefore, that the judge would be trauma informed and that I would be protected throughout the process by the judge and by the rules of the Federal Circuit Court.

Such rules included that direct cross examination could be prevented between the victim and perpetrator, a McKenzie friend may be permitted, and that cross examination may be able to occur via video link. Courts are also able to nominate an independent children's lawyer to ensure the child is independently represented in cases where there exists high levels of acrimony. None of these things were implemented in my case, despite my strong and consistent claims of family violence in the form of emotional abuse. While these are said to be mandatory protections, there appears to be no recourse available to me for the failure of the judge to implement protections and the significant damage that this has caused me. The judge is, effectively, above the law and unaccountable to the laws which supposedly bind him.

It was also my expectation that the judge would understand the dynamics of controlling, abusive relationships, given that he would no doubt have many cases before him where these dynamics exist.

My expectations were not met. I was not protected in any way, and the dynamics of control were overlooked or dismissed by the judge altogether. The judge interpreted the conflict as being a case of 'tit for tat' between two hostile and vindictive individuals and was quick to accept the father's allegations that I have been obstructive of his relationship with our son, despite the lack of evidence presented by the father (aside from his own word).

I was in a state of shock as I was being cross examined. My claims of harassment and coercion were mocked by the judge when he would interrupt the father's cross examination to aggressively prosecute the father's argument on his behalf as though he was the father's legal representative.

My experience before this judge was so traumatic that I would be terrified to go before another judge, for any reason. This would be especially so if I knew I was to be fully beholden to the whims and moods of a judge on any given day.

This judge had a reputation that preceded him. We had been advised that he can be 'mercurial' and also that he is misogynistic in his views. I was sceptical of these claims before I went before him myself, thinking that these could not possibly be traits of a family law judge, however I was badly mistaken.

Based on my own experiences, I have concerns that this judge, and perhaps other judges could:

- be ill-equipped to understand and identify the power imbalances that so often exist between victims and perpetrators;
- be ill-equipped to identify controlling and abusive people who fall outside of historical and stereotypical profiles of abusers;
- be ill-equipped to identify when perpetrators continue their abuse through the court process by such mechanisms as gas-lighting, making false allegations and blaming the victim (she was drunk, acting seductively etc);
- be ill-equipped to accept and identify that abuse victims can come from diverse backgrounds – they may appear weak, strong, rich, poor, educated, damaged, angry, scared, articulate, numb, frozen, big, small or anything in between;
- mistake reactions of victims to their abuse as being obstructive, vindictive or aggressive.

The current mechanism of appointing judges seems to fail to take into account training specifically on trauma and abuse. To my mind, this would need to be addressed before the Sentencing Amendment (Restorative Scheme) Bill could be safely enacted.

Risk of retraumatisation and silencing

Even where a victim may be in a reasonably good place going into a restorative justice process, I am concerned about how triggering it would be to be unrepresented and have to communicate directly with a judge and perpetrator about the trauma of their abuse. The stress could render victims unable to speak, stand up for themselves and defend themselves, as happened to me when I was being cross examined by my perpetrator and the judge in the Federal Circuit Court.

In my case, I was too unwell to attend my final hearing and deliver a closing address. I had a medical certificate for this and was able to make a final submission in writing. I felt pressured to concede important things in order to resolve the case, simply to avoid having to attend court again in the future. I did not see how I could ever go through that again, and certainly knew that I would not be able to effectively advocate for myself under those conditions. I had felt like my voice was stamped out by the judge and that I was unable to present my case.

I am concerned that others like me might feel pressured to concede or agree to things that are not acceptable, either through pressure or harassment by the court appointed professional (as I experienced from a judge), or through a desire to end the process quickly.

Further questions

1. How can the judges undertaking these specialised cases be assessed for competency and to ensure they have met certain standards of knowledge and understanding of trauma and abuse?
2. Has the proposed scheme been modelled elsewhere and what have the outcomes been?
3. What evidence is there that recidivism rates decline and that there is rehabilitative progress amongst those who have been sentenced under the scheme?
4. A decrease in the number of people serving sentences of imprisonment is cited as a potential community benefit and it may well have a cost benefit to the community, but are there other benefits?

5. How does this impact victims, especially if their perpetrators are seen to be receiving sentences on the lesser end of the spectrum?
6. What evidence is there that restorative schemes are more effective in meeting expectations of victims?
7. Would the proposed amendments give the message to offenders that imprisonment can be avoided in cases of sexual offences, thereby reducing or removing the deterrent a severe sentence such as imprisonment may currently provide?
8. Would perpetrators get off lightly?
9. Would a trial scheme be prudent before any permanent amendments to sentencing practices are made?